

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
REGION IX

IN THE MATTER OF:  
Waimanalo Gulch Sanitary Landfill  
Oahu, Hawai`i

Waste Management of Hawaii, Inc.,  
  
Respondent

ADMINISTRATIVE ORDER ON  
CONSENT FOR REMOVAL ACTION

U.S. EPA Region IX  
CERCLA Docket No. 09-2011-0007  
RCRA Docket No. 7003-09-2011-0001

Proceeding Under Sections 104, 106(a), 107  
and 122 of the Comprehensive  
Environmental Response, Compensation,  
and Liability Act, as amended, 42 U.S.C.  
§§ 9604, 9606(a), 9607 and 9622 , and  
Section 7003(a) of the Resource  
Conservation and Recovery Act, as  
amended, 42 U.S.C. § 6973(a)

## **I. JURISDICTION AND GENERAL PROVISIONS**

1. This Administrative Order on Consent (“Order”) is entered into voluntarily by the United States Environmental Protection Agency (“EPA”) and Waste Management of Hawaii, Inc. (“WMH,” or “Respondent”). This Order provides for the performance of a removal action by Respondent and the reimbursement of certain response costs incurred by the United States at or in connection with the property located in the Waimanalo Gulch, at 92-460 Farrington Highway, in Kapolei on the leeward side of Oahu, Hawai`i, as may be referenced herein as the “Waimanalo Gulch Sanitary Landfill Site” or the “Site.”

2. This Order is issued under the authority vested in the President of the United States by Sections 104, 106(a), 107 and 122 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9604, 9606(a), 9607 and 9622, as amended (“CERCLA”), and Section 7003(a) of the Resource Conservation and Recovery Act, as amended (“RCRA”), 42 U.S.C. § 6973(a).

3. EPA has notified the State of Hawai`i (the “State”) of this action pursuant to Section 106(a) of CERCLA, 42 U.S.C. § 9606(a), and Section 7003(a) of RCRA, 42 U.S.C. § 6973(a).

4. EPA and Respondent recognize that this Order has been negotiated in good faith and that the actions undertaken by Respondent in accordance with this Order do not constitute an admission of any liability. Respondent does not admit, and retains the right to controvert in any subsequent proceedings other than proceedings to implement or enforce this Order, the validity of the findings of facts, conclusions of law, and determinations in Sections IV and V of this Order. Respondent agrees to comply with and be bound by the terms of this Order and further agrees that it will not contest the basis or validity of this Order or its terms.

## **II. PARTIES BOUND**

5. This Order applies to and is binding upon EPA and on Respondent and its successors and assigns. Any change in ownership or corporate status of Respondent including, but not limited to, any transfer of assets or real or personal property shall not alter Respondent’s responsibilities under this Order.

6. Respondent is jointly and severally liable for carrying out all activities required by this Order.

7. Respondent shall ensure that its prime contractors receive a copy of this Order and comply with this Order. Respondent shall be responsible for any noncompliance with this Order.

## **III. DEFINITIONS**

8. Unless otherwise expressly provided herein, terms used in this Order that are defined in CERCLA or RCRA, or in regulations promulgated under CERCLA or RCRA, shall have the meaning assigned to them in such statute or regulations. Whenever terms listed below are used

in this Order or in the appendices attached hereto and incorporated hereunder, the following definitions shall apply:

a. "CERCLA" shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. §§ 9601, *et seq.*

b. "Day" shall mean a calendar day. In computing any period of time under this Order, where the last day would fall on a Saturday, Sunday, or federal holiday, the period shall run until the close of business of the next working day.

c. "DOH," shall mean the Hawai'i Department of Health and any successor departments or agencies of the State.

d. "Effective Date" shall be the effective date of this Order as provided in Section XXXI.

e. "EPA" shall mean the United States Environmental Protection Agency and any successor departments or agencies of the United States.

f. "Interest" shall mean interest at the rate specified for interest on investments of the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a). The applicable rate of interest shall be the rate in effect at the time the interest accrues. The rate of interest is subject to change on October 1 of each year.

g. "Municipal Solid Waste" shall mean waste material: (a) generated by a household (including a single or multifamily residence); or (b) generated by a commercial, industrial or institutional entity, to the extent that the waste material (i) is essentially the same as waste normally generated by a household; (ii) is collected and disposed of with other municipal solid waste as part of normal municipal solid waste collection services; and (iii) contains a relative quantity of hazardous substances no greater than the relative quantity of hazardous substances contained in waste material generated by a typical single-family household.

h. "National Contingency Plan" or "NCP" shall mean the National Oil and Hazardous Substances Pollution Contingency Plan promulgated pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, codified at 40 C.F.R. Part 300, and any amendments thereto.

i. "Order" shall mean this Administrative Order on Consent, EPA CERCLA Dkt. No. 09-2011-0007, RCRA Dkt. No. 7003-09-2011-0001. In the event of conflict between this Order and any appendix, this Order shall control.

j. "Paragraph" shall mean a portion of this Order identified by an Arabic numeral.

k. "Parties" shall mean EPA and Respondent.

l. “RCRA” shall mean the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901, *et seq.*

m. “Respondent” shall mean Waste Management of Hawaii, Inc.

n. “Response Costs” shall mean all costs, including, but not limited to, direct and indirect costs, that the United States incurs in reviewing or developing plans, reports and other items pursuant to this Order, verifying the Work, or otherwise implementing, overseeing, or enforcing this Order, including but not limited to, payroll costs, contractor costs, travel costs, laboratory costs, the costs incurred pursuant to Paragraph 28 (costs and attorneys fees and any monies paid to secure access, including the amount of just compensation), Paragraph 38 (emergency response), and Paragraph 63 (work takeover).

o. “Section” shall mean a portion of this Order identified by a Roman numeral.

p. “Site” shall mean the Waimanalo Gulch Sanitary Landfill (“WGSL”), located at 92-460 Farrington Highway, in Kapolei on the leeward side of Oahu, Hawai`i, including any area where a Waste Material from the WGSL has come to be located.

q. “State” shall mean the state of Hawai`i.

r. “Waste Material” shall mean 1) any “hazardous substance” under Section 101(14) of CERCLA, 42 U.S.C. § 9601(14); 2) any pollutant or contaminant under Section 101(33) of CERCLA, 42 U.S.C. § 9601(33); 3) any “solid waste” under Section 1004(27) of RCRA, 42 U.S.C. § 6903(27); or 4) any “hazardous material” as may be defined under State law.

s. “Work” shall mean all activities Respondent is required to perform under this Order.

#### **IV. FINDINGS OF FACT**

9. Respondent operates the WGSL as a municipal solid waste landfill. The WGSL is the only operating municipal solid waste landfill on the island of Oahu, in Hawai`i. Respondent receives a significant amount of commercial wastes generated within Oahu at the Site, which may include Waste Material from Conditionally Exempt Small Quantity Generator wastes, as defined at 40 C.F.R. § 261.5(a).

10. The WGSL property is owned by the City & County of Honolulu (“CCH”) and operated by Respondent.

11. A storm event during the week of January 10, 2011, caused extreme flooding within the Site, filling and overflowing a landfill cell containing Waste Material, including treated medical wastes. Rainfall indicators showed that at least 11 inches of rain fell on the watershed within a 24 hour period. Releases from this flooded cell carried Waste Material into the WGSL

stormwater conveyance system, which flows down the Waimanalo Gulch to the downgradient beach and into the Pacific Ocean.

12. The down gradient beach adjoins a residential and resort community. The beach and Pacific Ocean are subject to commercial and recreational uses.

13. Flooding at the Site may be a threat to the integrity of cell #E6 at the Site.

## **V. CONCLUSIONS OF LAW AND DETERMINATIONS**

14. Based on the Findings of Fact set forth above, and the Administrative Record supporting this removal action, EPA has determined that:

a. The Waimanalo Gulch Sanitary Landfill Site is a “facility” as defined by Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

b. Waste Materials at the Site, as identified in the Findings of Fact above, includes “solid wastes” as defined by Section 1004(27) of RCRA, 42 U.S.C. § 6903(27), and may include “hazardous substance(s)” as defined by Section 101(14) of CERCLA, 42 U.S.C. § 9601(14), including hazardous substances that are typically included in Municipal Solid Waste.

c. Respondent is a “person” as defined by Section 101(21) of CERCLA, 42 U.S.C. § 9601(21), and by Section 1004(15) of RCRA, 42 U.S.C. § 6903(15).

d. Respondent is a responsible party under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), and is jointly and severally liable for performance of response action and for response costs incurred and to be incurred at the Site. Respondent is the “operator” of the Site, as defined by Section 101(20) of CERCLA, 42 U.S.C. § 9601(20), and within the meaning of Section 107(a)(1) of CERCLA, 42 U.S.C. § 9607(a)(1).

e. The Waste Materials discharged from the Site, as described in the Findings of Fact, above, are the result of disposal, as defined in Section 1004(3) of RCRA, 42 U.S.C. § 6903(3).

f. The conditions described in the Findings of Fact above constitute an actual or threatened “release” of a hazardous substance from the facility as defined by Section 101(22) of CERCLA, 42 U.S.C. § 9601(22), and may present an imminent and substantial endangerment to the public health or welfare or the environment in accordance with Section 106(a) of CERCLA, 42 U.S.C. § 9606(a) .

g. Based on the foregoing Findings of Fact, and pursuant to Section 7003(a) of RCRA, 42 U.S.C. § 6973(a), Respondent's past or present handling, storage, treatment, transportation or disposal of any solid or hazardous waste at the Site may present an imminent and substantial endangerment to health or the environment.

h. The removal action required by this Order is necessary to protect the public health, welfare, or the environment and, if carried out in compliance with the terms of this Order, will be considered consistent with the NCP, as provided in Section 300.700(c)(3)(ii) of the NCP.

## **VI. ORDER**

Based upon the foregoing Findings of Fact, Conclusions of Law, Determinations, and the Administrative Record for this Site, it is hereby Ordered and Agreed that Respondent shall comply with all provisions of this Order, including, but not limited to all documents incorporated by reference into this Order.

## **VII. DESIGNATION OF CONTRACTOR, PROJECT COORDINATOR, AND ON-SCENE COORDINATOR**

15. Respondent has retained one or more contractors to perform the Work and shall notify EPA and DOH of the name(s) and qualifications of such contractor(s) within two (2) days of the Effective Date. Respondent shall also notify EPA and DOH of the name(s) and qualification(s) of any other contractor(s) or subcontractor(s) retained to perform the Work at least two (2) days prior to commencement of such Work. EPA retains the right to disapprove of any or all of the contractors and/or subcontractors retained by Respondent. If EPA disapproves of a selected contractor, Respondent shall retain a different contractor and shall notify EPA and DOH of that contractor's name and qualifications within two (2) days of EPA's disapproval. Unless expressly waived by EPA, any proposed contractor must demonstrate compliance with ANSI/ASQC E-4-1994, "Specifications and Guidelines for Quality Systems for Environmental Data Collection and Environmental Technology Programs" (American National Standard, January 5, 1995), by submitting a copy of the proposed contractor's Quality Management Plan ("QMP"). The QMP should be prepared in accordance with "EPA Requirements for Quality Management Plans (QA/R-2)" (EPA/240/B0-1/002), or equivalent documentation as required by EPA.

16. Respondent has designated a Project Coordinator who shall be responsible for administration of all actions by Respondent required by this Order. The Project Coordinator's name, address, and telephone number are:

Joseph Whelan  
General Manager  
Waste Management of Hawaii, Inc.  
Waimanalo Gulch Landfill  
92-460 Farrington Highway  
Kapolei, Hawaii 96707  
(808) 668-2985

To the greatest extent possible, the Project Coordinator shall be present on Site or readily available during Site work. EPA retains the right to disapprove of the designated Project

Coordinator. If EPA disapproves of the designated Project Coordinator, Respondent shall retain a different Project Coordinator and shall notify EPA and DOH of that person's name, address, telephone number, and qualifications within five (5) days following EPA's disapproval. Receipt by Respondent's Project Coordinator of any notice or communication from EPA relating to this Order shall constitute receipt by Respondent.

17. EPA has designated Bret Moxley of the EPA's Emergency Response Section, as its On-Scene Coordinator ("OSC") for this Site, and Katherine Baylor of EPA's Waste Division, as its RCRA action officer ("RAO") for this Site. Except as otherwise provided in this Order, Respondent shall direct all submissions required by this Order to the OSC and the RAO at the following addresses:

Bret Moxley  
U.S. Environmental Protection Agency  
Region IX (SFD-9)  
75 Hawthorne Street  
San Francisco, CA 94105  
[moxley.bret@epa.gov](mailto:moxley.bret@epa.gov)

Katherine Baylor  
U.S. Environmental Protection Agency  
Region IX (WST-5)  
75 Hawthorne Street  
San Francisco, CA 94105  
[baylor.katherine@epa.gov](mailto:baylor.katherine@epa.gov)

Respondent shall direct all submissions required by this Order to the DOH at the following addresses:

Stuart Yamada, P.E., Chief  
Environmental Management Division  
Hawaii Department of Health  
919 Ala Moana Blvd., Room 300  
Honolulu, HI 96814-4920  
(808) 586-4304  
[stuart.yamada@doh.hawaii.gov](mailto:stuart.yamada@doh.hawaii.gov)  
[steven.chang@doh.hawaii.gov](mailto:steven.chang@doh.hawaii.gov)  
[alec.wong@doh.hawaii.gov](mailto:alec.wong@doh.hawaii.gov)

18. EPA and Respondent shall have the right, subject to EPA's review consistent with Paragraph 16, to change their respective designated OSC, RAO or Project Coordinator. Respondent shall notify EPA three (3) days before such a change is made. The initial notification may be made orally, but shall be promptly followed by a written notice.

## **VIII. WORK TO BE PERFORMED**

19. Respondent shall perform, at a minimum, all actions necessary to implement the Work required in this Order, and the approved Work Plan(s). The actions to be implemented include, but are not limited to, the following:

- a. Within ten (10) days of the Effective Date, Respondent shall provide to EPA and DOH an analysis by a qualified Civil or Geotechnical Engineer of the stability and suitability of the temporary earthen berm, which is currently retaining liquid in cell #E6, to retain liquid when full to within one (1) foot of the top for up to six (6) weeks, and a Work Plan to ensure the integrity of the temporary earthen berm so long as it is holding liquid.
- b. Within twenty-one (21) days of the Effective Date, Respondent shall complete construction of a functional storm water diversion structure on the west side above cell #E6.
- c. Respondent shall ensure the termination of discharges of liquid originated from cell #E6 to the Pacific Ocean, except as in compliance with any applicable permit.
- d. Respondent shall continue to collect and transport to a local treatment facility the liquids at the Site retained behind the temporary earthen berm in cell #E6. Within seven (7) days of the Effective Date, Respondent shall provide a written description of the collection and treatment activities, the current permitting and the chemical parameters of the liquids, and transportation methods to the local treatment facility.
- e. Within seven (7) days of the Effective Date, Respondent shall provide to EPA and DOH a Work Plan and schedule, subject to modification based on further field analysis, for managing the hydraulic head between cell #E6 and the fluids outside of cell #E6 in order to maintain the integrity of the cell liner as the fluids are drawn down and the leachate collection system is returned to normal functions.
- f. Within fourteen (14) days of the Effective Date, Respondent shall provide to EPA and DOH a Work Plan and schedule to evaluate and demonstrate or restore the integrity of the liner system in cell #E6.
- g. Respondent shall not operate cell #E6 without further approval from EPA.
- h. Within seven (7) days of the Effective Date, Respondent shall provide to EPA and DOH a Work Plan and schedule to restore the sediment basin system to its intended capacity and function. This shall include removal of the sediment collected in the basin(s) and the proposed disposal location for the collected sediments.
- i. Within seven (7) days of the Effective Date, Respondent shall provide to EPA and DOH a Work Plan and schedule for ongoing daily beach assessment and recovery of Waste Material released from the WGS�.



20. Work Plans and Implementation.

a. Respondent shall submit to EPA for approval a draft Work Plan or individual Work Plans for performing the response actions generally described in Paragraph 19 (individual Work Plans may be practical to meet specific objectives and respective schedule considerations). The draft Work Plan(s) shall provide a description of, and a schedule for, the respective actions required by the Work Plan(s). Respondent shall submit a copy of all Work Plan(s) to DOH.

b. EPA may approve, disapprove, require revisions to, or modify any draft Work Plan in whole or in part. If EPA requires revisions, Respondent shall submit a revised draft Work Plan within fifteen (15) days of receipt of EPA's notification of the required revisions. Respondent shall implement each respective Work Plan as approved in writing by EPA in accordance with the schedule approved by EPA. Once approved, or approved with modifications, each Work Plan, its schedule, and any subsequent modifications shall be incorporated into and become fully enforceable under this Order.

c. Respondent shall not conduct any Work except in conformance with the terms of this Order, or as directed by EPA.

21. Health and Safety Plan. Within seven (7) days, Respondent shall submit for EPA review and comment a Site Health and Safety Plan that ensures the protection of the public health and safety during performance of on-Site Work. This plan shall be prepared in accordance with EPA's Standard Operating Safety Guide (PUB 9285.1-03, PB 92-963414, June 1992), if applicable. In addition, the plan shall comply with all currently applicable Occupational Safety and Health Administration ("OSHA") regulations found at 29 C.F.R. Part 1910. If EPA determines that it is appropriate, the plan also shall include contingency planning. Respondent shall incorporate all changes to the plan recommended by EPA and shall implement the plan with changes through the duration of the Work. Respondent shall provide EPA with a Site Health and Safety Plan that EPA has reviewed. Respondent shall submit for EPA review and comment any changes to the Health and Safety Plan, or revisions within ten (10) days after notice of additional comments from EPA.

22. Quality Assurance and Sampling.

a. Although none is presently anticipated, all sampling and analyses performed pursuant to this Order shall conform to EPA direction, approval, and guidance regarding sampling, quality assurance/quality control ("QA/QC"), data validation, and chain of custody procedures. Respondent shall ensure that the laboratory used to perform the analyses participates in a QA/QC program that complies with the appropriate EPA guidance. Respondent shall follow, as appropriate, "Quality Assurance/Quality Control Guidance for Removal Activities: Sampling QA/QC Plan and Data Validation Procedures" (OSWER Directive No. 9360.4-01, April 1, 1990), as guidance for QA/QC and sampling. Respondent shall only use laboratories that have a documented Quality System that complies with ANSI/ASQC E-4 1994, "Specifications and Guidelines for Quality Systems for Environmental Data Collection and Environmental Technology Programs" (American National Standard, January 5, 1995), and "EPA Requirements

for Quality Management Plans (QA/R-2) (EPA/240/B-01/002, March 2001),” or equivalent documentation as determined by EPA. EPA may consider laboratories accredited under the National Environmental Laboratory Accreditation Program (“NELAP”) as meeting the Quality System requirements.

b. On request by EPA, Respondent shall have such a laboratory analyze samples submitted by EPA for QA monitoring. Respondent shall provide to EPA the QA/QC procedures followed by all sampling teams and laboratories performing data collection and/or analysis.

c. On request by EPA, Respondent shall allow EPA or its authorized representatives to take split and/or duplicate samples. Respondent shall notify EPA not less than fifteen (15) days in advance of any sample collection activity, unless shorter notice is agreed to by EPA. EPA shall have the right to take any additional samples that EPA deems necessary. Upon request, EPA shall allow Respondent to take split or duplicate samples of any samples it takes as part of its oversight of Respondent’s implementation of the Work.

23. Post-Removal Site Control. No Post removal site control is anticipated in this Order.

24. Reporting.

a. Beginning two (2) days after the Effective Date, Respondent shall submit by e-mail to EPA and DOH daily, until agreed otherwise by the Parties, progress reports (Monday through Friday only, unless otherwise requested by EPA) concerning actions undertaken pursuant to this Order, until receipt of the Notice of Completion pursuant to this Order, unless otherwise directed in writing by the OSC or RAO. These reports shall describe all significant developments during the preceding period, including the actions performed and any problems encountered, analytical data received during the reporting period, and the developments anticipated during the next reporting period, including a schedule of actions to be performed under any approved Work Plan, anticipated problems, and planned resolutions of past or anticipated problems.

b. Respondent shall submit copies of all plans, reports (other than progress reports) or other submissions required by this Order, or any approved Work Plan, to both EPA and DOH in electronic form (Word or pdf - minimum 300 dpi).

25. Final Report. Within sixty (60) days after completion of all Work required by this Order, Respondent shall submit for EPA review and approval a final report summarizing the actions taken to comply with this Order. The final report shall conform, at a minimum, with the requirements set forth in Section 300.165 of the NCP entitled “OSC Reports.” The final report shall include a good faith estimate of total costs or a statement of actual costs incurred in complying with the Order, a listing of quantities and types of materials removed off-Site or handled on-Site, a discussion of removal and disposal options considered for those materials, a listing of the ultimate destination(s) of those materials, a presentation of the analytical results of all sampling and analyses performed, and accompanying appendices containing all relevant

documentation generated during the removal action (*e.g.*, manifests, invoices, bills, contracts, and permits). The final report shall also include the following certification signed by a person who supervised or directed the preparation of that report:

“Under penalty of law, I certify that to the best of my knowledge, after appropriate inquiries of all relevant persons involved in the preparation of the report, the information submitted is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.”

Respondent shall send any approved final report to DOH.

26. Off-Site Shipments.

a. Respondent shall, prior to any off-Site shipment of Waste Material from the Site to an out-of-state waste management facility, provide written notification of such shipment of Waste Material to the appropriate state environmental official in the receiving facility's state and to the OSC and RAO. However, this notification requirement shall not apply to any off-Site shipments when the total annual volume of all such shipments will not exceed ten (10) cubic yards.

i. Respondent shall include in the written notification the following information: 1) the name and location of the facility to which the Waste Material is to be shipped; 2) the type and quantity of the Waste Material to be shipped; 3) the expected schedule for the shipment of the Waste Material; and 4) the method of transportation. Respondent shall notify the state in which the planned receiving facility is located of major changes in the shipment plan, such as a decision to ship the Waste Material to another facility within the same state, or to a facility in another state.

ii. The identity of the receiving facility and state will be determined by Respondent following the award of the contract for the removal action. Respondent shall provide the information required by subparts (a) and (b) of this Paragraph as soon as practicable after the award of the contract and before the Waste Material is actually shipped.

b. Before shipping any hazardous substances, pollutants, or contaminants from the Site to an off-Site location, Respondent shall obtain EPA's certification that the proposed receiving facility is operating in compliance with the requirements of CERCLA Section 121(d)(3), 42 U.S.C. § 9621(d)(3), and 40 C.F.R. § 300.440. Respondent shall only send hazardous substances, pollutants, or contaminants from the Site to an off-Site facility that complies with the requirements of the statutory provision and regulation cited in the preceding sentence, or that otherwise is permitted to receive Waste Material from the Site.

## **IX. SITE ACCESS**

27. If the Site, or any other property where access is needed to implement this Order, is owned or controlled by the Respondent, Respondent shall, commencing on the Effective Date, provide EPA, the State, and their representatives, including contractors, with access at all reasonable times to the Site, or such other property, for the purpose of conducting any activity related to this Order.

28. Where any action under this Order is to be performed in areas owned by or in possession of someone other than Respondent, Respondent shall use its best efforts to obtain all necessary access agreements within five (5) days after the Effective Date, or as otherwise specified in writing by the OSC or RAO. Respondent shall immediately notify EPA if after using its best efforts it is unable to obtain such agreements. For purposes of this Paragraph, "best efforts" includes the payment of reasonable sums of money in consideration of access. Respondent shall describe in writing its efforts to obtain access. EPA may then assist Respondent in gaining access, to the extent necessary to effectuate the response actions described herein, using such means as EPA deems appropriate. Respondent shall reimburse EPA for all costs and attorney's fees incurred by the United States in obtaining such access, in accordance with the procedures in Section XV (Payment of Response Costs).

29. Notwithstanding any provision of this Order, EPA retains all of its access authorities and rights, including enforcement authorities related thereto, under CERCLA, RCRA, and any other applicable statutes or regulations.

## **X. ACCESS TO INFORMATION**

30. Respondent shall provide to EPA, on request, copies of all documents and information within its possession or control or that of its contractors or agents relating to activities at the Site or to the implementation of this Order, including, but not limited to, sampling, analysis, chain of custody records, manifests, trucking logs, receipts, reports, sample traffic routing, correspondence, or other documents or information related to the Work. Respondent shall also make available to EPA, for purposes of investigation, information gathering, or testimony, its employees, agents, or representatives with knowledge of relevant facts concerning the performance of the Work.

31. Respondent may assert business confidentiality claims covering part or all of the documents or information submitted to EPA under this Order to the extent permitted by and in accordance with Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7), and 40 C.F.R. § 2.203(b). Documents or information determined to be confidential by EPA will be afforded the protection specified in 40 C.F.R. Part 2, Subpart B. If no claim of confidentiality accompanies documents or information when they are submitted to EPA, or if EPA has notified Respondent that the documents or information are not confidential under the standards of Section 104(e)(7) of CERCLA or 40 C.F.R. Part 2, Subpart B, the public may be given access to such documents or information without further notice to Respondent.

32. Respondent may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If

the Respondent asserts such a privilege in lieu of providing documents, it shall provide EPA with the following: 1) the title of the document, record, or information; 2) the date of the document, record, or information; 3) the name and title of the author of the document, record, or information; 4) the name and title of each addressee and recipient; 5) a description of the contents of the document, record, or information, except to the extent that such disclosure would reveal information subject to the applicable privilege; and 6) the privilege asserted by Respondent. However, no documents, reports or other information created or generated pursuant to the requirements of this Order shall be withheld on the grounds that they are privileged.

33. No claim of confidentiality shall be made with respect to any data, including, but not limited to, all sampling, analytical, monitoring, hydrogeologic, scientific, chemical, or engineering data, or any other documents or information evidencing conditions at or around the Site.

## **XI. RECORD RETENTION**

34. Until three (3) years after Respondent's receipt of EPA's notification pursuant to Section XXIX (Notice of Completion of Work), Respondent shall preserve and retain all non-identical copies of records and documents (including records or documents in electronic form) now in its possession or control or that come into its possession or control that is relevant to the performance of the Work or the liability of any person under CERCLA or RCRA with respect to the Site, regardless of any corporate retention policy to the contrary. Until three (3) years after Respondent's receipt of EPA's notification pursuant to Section XXIX (Notice of Completion of Work), Respondent shall also instruct its contractors and agents to preserve all documents, records, and information of whatever kind, nature or description that are relevant to the Work.

35. At the conclusion of this document retention period, Respondent shall notify EPA at least ninety (90) days prior to the destruction of any such records or documents, and, on request by EPA, Respondent shall deliver any such records or documents to EPA. Respondent may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Respondent asserts such a privilege, it shall provide EPA with the following: 1) the title of the document, record, or information; 2) the date of the document, record, or information; 3) the name and title of the author of the document, record, or information; 4) the name and title of each addressee and recipient; 5) a description of the subject of the document, record, or information, except to the extent that such disclosure would reveal information subject to the applicable privilege; and 6) the privilege asserted by Respondent. However, no documents, reports or other information created or generated pursuant to the requirements of this Order shall be withheld on the grounds that they are privileged.

36. [This Paragraph intentionally left blank.]

## **XII. COMPLIANCE WITH OTHER LAWS**

37. Respondent shall perform all actions required pursuant to this Order in accordance with all applicable local, state, and federal laws and regulations except as provided in Section 121(e) of CERCLA, 42 U.S.C. § 6921(e), and 40 C.F.R. §§ 300.400(e) and 300.415(j). In accordance with 40 C.F.R. § 300.415(j), all on-Site actions required pursuant to this Order shall, to the extent practicable, as determined by EPA, considering the exigencies of the situation, attain applicable or relevant and appropriate requirements (“ARARs”) under federal environmental or state environmental or facility siting laws. Work done pursuant to this Order shall not affect Respondent’s obligations that may exist under other law, regulation, permit or approval.

### **XIII. EMERGENCY RESPONSE AND NOTIFICATION OF RELEASES**

38. In the event of any action or occurrence during performance of the Work which causes or threatens a release of Waste Material from the Site that constitutes an emergency situation or may present an immediate threat to public health or welfare or the environment, Respondent shall immediately take all appropriate action. Respondent shall take these actions in accordance with all applicable provisions of this Order, including, but not limited to, the Health and Safety Plan, in order to prevent, abate or minimize such release or endangerment caused or threatened by the release. Respondent shall also immediately notify the OSC or the RAO, or, in the event of their unavailability, the Regional Duty Officer at (800) 300-2193 of the incident or Site conditions. In the event that Respondent fails to take appropriate response action as required by this Paragraph, and EPA takes such action instead, Respondent shall reimburse EPA all costs of the response action not inconsistent with the NCP pursuant to Section XV (Payment of Response Costs).

39. In addition, until Respondent receives a Notice of Completion pursuant to Section XXIX, in the event of any release of a of a hazardous substance from the Site, Respondent shall immediately notify the OSC or RAO, and the National Response Center at (800) 424-8802. Respondent shall submit a written report to EPA within seven (7) days after each release, setting forth the events that occurred and the measures taken or to be taken to mitigate any release or endangerment caused or threatened by the release and to prevent the reoccurrence of such a release. This reporting requirement is in addition to, and not in lieu of, reporting under Section 103(c) of CERCLA, 42 U.S.C. § 9603(c), and Section 304 of the Emergency Planning and Community Right-To-Know Act of 1986, 42 U.S.C. § 11004, *et seq.*

### **XIV. AUTHORITY OF ON-SCENE COORDINATOR**

40. The OSC and RAO shall be responsible for overseeing Respondent’s implementation of this Order. The OSC and RAO shall have the authority the vested in them under federal law, including the authority to halt, conduct, or direct any Work required by this Order. Absence of the OSC or RAO from the Site shall not be cause for stoppage of work unless specifically directed by the OSC or RAO.

### **XV. PAYMENT OF RESPONSE COSTS**

41. Payments for Response Costs.

a. Respondent shall pay EPA all Response Costs not inconsistent with the NCP. On a periodic basis, EPA will send Respondent a bill requiring payment that includes a cost summary report. Respondent shall make all payments within thirty (30) days of receipt of each bill requiring payment, except as otherwise provided in Paragraph 43 of this Order.

b. Respondent shall make all payments required by this Paragraph by a certified or cashier's check or checks made payable to "EPA Hazardous Substance Superfund," referencing the name and address of the party making payment and the EPA Docket Number of this Order. Respondent shall send the check(s) to:

U.S. Environmental Protection Agency  
Superfund Payments  
Cincinnati Finance Center  
P.O. Box 979076  
St. Louis, MO 63197-9000

Alternatively, payments greater than \$10,000 may be made by wire transfer directed as follows:

Federal Reserve Bank of New York  
ABA = 021030004  
Account = 68010727  
SWIFT Address = FRNYUS33  
33 Liberty Street  
New York, NY 10045  
Field Tag 4200 to read "D 6801727 Environmental Protection Agency"

c. At the time of payment, Respondent shall send notice that payment has been made to:

David Wood  
U.S. Environmental Protection Agency  
75 Hawthorne Street  
San Francisco, CA 94105

d. The total amount to be paid by Respondent pursuant to Paragraph 41(a) shall be deposited in the Waimanalo Gulch Sanitary Landfill Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund.

42. In the event that any payment for Response Costs is not made within thirty (30) days of Respondent's receipt of a bill, Respondent shall pay Interest on the unpaid balance. The Interest on unpaid Response Costs shall begin to accrue on the date of the bill and shall continue

to accrue until the date of payment. Payments of Interest made under this Paragraph shall be in addition to such other remedies or sanctions available to the United States by virtue of Respondent's failure to make timely payments under this Section, including but not limited to, payment of stipulated penalties pursuant to Section XVIII.

43. Respondent may dispute all or part of a bill for Response Costs submitted under this Order, if Respondent alleges that EPA has made an accounting error, or if Respondent alleges that a cost item is inconsistent with the NCP. If any dispute over costs is resolved before payment is due, the amount due will be adjusted as necessary. If the dispute is not resolved before payment is due, Respondent shall pay the full amount of the uncontested costs to EPA as specified in Paragraph 41 on or before the due date. Within the same time period, Respondent shall pay the full amount of the contested costs into an interest-bearing escrow account. Respondent shall simultaneously transmit a copy of both checks to the persons listed in Paragraph 41(c) above. Respondent shall ensure that the prevailing party or parties in the dispute shall receive the amount upon which they prevailed from the escrow funds plus interest within seven (7) days after the dispute is resolved.

## **XVI. DISPUTE RESOLUTION**

44. Unless otherwise expressly provided for in this Order, the dispute resolution procedures of this Section shall be the exclusive mechanism for resolving disputes arising under this Order. The Parties shall attempt to resolve any disagreements concerning this Order expeditiously and informally.

45. If Respondent objects to any EPA action taken pursuant to this Order, including billings for Response Costs, it shall notify EPA in writing of its objection(s) within fifteen (15) days of such action, unless the objection(s) has/have been resolved informally. EPA and Respondent shall have fifteen (15) days from EPA's receipt of Respondent's written objection(s) to resolve the dispute through formal negotiations (the "Negotiation Period"). The Negotiation Period may be extended at the sole discretion of EPA.

46. Any agreement reached by the parties pursuant to this Section shall be in writing and shall, on signature by both parties, be incorporated into and become an enforceable part of this Order. If the Parties are unable to reach an agreement within the Negotiation Period, an EPA management official at the Assistant Director level or higher will issue a written decision on the dispute to Respondent. EPA's decision shall be incorporated into and become an enforceable part of this Order. Respondent's obligations under this Order shall not be tolled by submission of any objection for dispute resolution under this Section. Following resolution of the dispute, as provided by this Section, Respondent shall fulfill the requirement that was the subject of the dispute in accordance with the agreement reached or with EPA's decision, whichever occurs.

## **XVII. FORCE MAJEURE**

47. Respondent agrees to perform all requirements of this Order within the time limits established under this Order, unless the performance is delayed by a *force majeure*. For



purposes of this Order, a *force majeure* is defined as any event arising from causes beyond the control of Respondents, or of any entity controlled by Respondent, including but not limited to its contractors and subcontractors, which delays or prevents performance of any obligation under this Order despite Respondent's best efforts to fulfill the obligation. *Force majeure* does not include financial inability to complete the Work, or increased cost of performance.

48. If any event occurs or has occurred that may delay the performance of any obligation under this Order, whether or not caused by a *force majeure* event, Respondent shall notify EPA orally within forty-eight (48) hours of when Respondent first knew that the event might cause a delay. Within four (4) days thereafter, Respondent shall provide to EPA in writing an explanation and description of the reasons for the delay; the anticipated duration of the delay; all actions taken or to be taken to prevent or minimize the delay; a schedule for implementation of any measures to be taken to prevent or mitigate the delay or the effect of the delay; Respondent's rationale for attributing such delay to a *force majeure* event if it intends to assert such a claim; and a statement as to whether, in the opinion of Respondent, such event may cause or contribute to an endangerment to public health, welfare or the environment. Failure to comply with the above requirements shall preclude Respondent from asserting any claim of *force majeure* for that event for the period of time of such failure to comply and for any additional delay caused by such failure.

49. If EPA agrees that the delay or anticipated delay is attributable to a *force majeure* event, the time for performance of the obligations under this Order that are affected by the *force majeure* event will be extended by EPA for such time as is necessary to complete those obligations. An extension of the time for performance of the obligations affected by the *force majeure* event shall not, of itself, extend the time for performance of any other obligation. If EPA does not agree that the delay or anticipated delay has been or will be caused by a *force majeure* event, EPA will notify Respondent in writing of its decision. If EPA agrees that the delay is attributable to a *force majeure* event, EPA will notify Respondent in writing of the length of the extension, if any, for performance of the obligations affected by the *force majeure* event.

### **XVIII. STIPULATED PENALTIES**

50. Respondent shall be liable to EPA for stipulated penalties in the amounts set forth in Paragraphs 51 and 52 for failure to comply with the requirements of this Order specified below, unless excused under Section XVII (*Force Majeure*). "Compliance" by Respondent shall include completion of the activities under this Order or any Work Plan or other plan approved under this Order identified below in accordance with all applicable requirements of law, this Order, and any plans or other documents approved by EPA pursuant to this Order and within the specified time schedules established by and approved under this Order.

51. Stipulated Penalty Amounts - Work.

a. The following stipulated penalties shall accrue per violation per day for any noncompliance implementing any Work Plan or requirement of this Order, except as may be covered in Paragraph 52:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$ 500	1st through 14th day
\$ 1,500	15th through 30th day
\$ 3,000	31st day and beyond

52. Stipulated Penalty Amounts - Reports. The following stipulated penalties shall accrue per violation per day for failure to submit timely or adequate reports or other written documents pursuant to this Order, except as required in Paragraphs 19 and 20:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$ 250	1st through 14th day
\$ 1,000	15th through 30th day
\$ 2,000	31st day and beyond

53. In the event that EPA assumes performance of a portion or all of the Work pursuant to Paragraph 63 of Section XX, Respondent shall be liable for a stipulated penalty in the amount of \$50,000.

54. All penalties shall begin to accrue on the day after the complete performance is due or the day a violation occurs, and shall continue to accrue through the final day of the correction of the noncompliance or completion of the activity. However, stipulated penalties shall not accrue: 1) with respect to a deficient submission under Section VIII (Work to be Performed), during the period, if any, beginning on the thirty-first (31<sup>st</sup>) day after EPA's receipt of such submission until the date that EPA notifies Respondent of any deficiency; and 2) with respect to a decision by the EPA Management Official at the Assistant Director level or higher, under Paragraph 46 of Section XVI (Dispute Resolution), during the period, if any, beginning on the twenty-first (21<sup>st</sup>) day after the Negotiation Period begins until the date that the EPA management official issues a final decision regarding such dispute. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Order.

55. Following EPA's determination that Respondent has failed to comply with a requirement of this Order, EPA may give Respondent written notification of the failure and describe the noncompliance. EPA may send Respondent a written demand for payment of the penalties. However, penalties shall accrue as provided in the preceding Paragraph regardless of whether EPA has notified Respondent of a violation.

56. All penalties accruing under this Section shall be due and payable to EPA within thirty (30) days of Respondent's receipt from EPA of a demand for payment of the penalties,

unless Respondent invokes the dispute resolution procedures under Section XVI (Dispute Resolution). All payments to EPA under this Section shall be paid by certified or cashier's check(s) made payable to "EPA Hazardous Substances Superfund," shall be mailed to:

U.S. Environmental Protection Agency  
Fines and Penalties  
Cincinnati Finance Center  
P.O. Box 979077  
St. Louis, MO 63197-9000

Respondent shall indicate that the payment is for stipulated penalties, and shall reference the EPA Region and the EPA Docket Number of this Order, and the name and address of the party making payment. Copies of check(s) paid pursuant to this Section, and any accompanying transmittal letter(s), shall be sent to EPA as provided in Paragraph 17 and 41(c).

57. The payment of penalties shall not alter in any way Respondent's obligation to complete performance of the Work required under this Order.

58. Penalties shall continue to accrue during any dispute resolution period, but need not be paid until fifteen (15) days after the dispute is resolved by agreement or by receipt of EPA's decision.

59. If Respondent fails to pay stipulated penalties when due, EPA may institute proceedings to collect the penalties, as well as Interest. Respondent shall pay Interest on the unpaid balance, which shall begin to accrue on the date of demand made pursuant to Paragraph 55. Nothing in this Order shall be construed as prohibiting, altering, or in any way limiting the ability of EPA to seek any other remedies or sanctions available by virtue of Respondent's violation of this Order or of the statutes and regulations upon which it is based, including, but not limited to, penalties pursuant to Sections 106(b) and 122(l) of CERCLA, 42 U.S.C. §§ 9606(b) and 9622(l), punitive damages pursuant to Section 107(c)(3) of CERCLA, 42 U.S.C. § 9607(c)(3), and penalties pursuant to Section 7003(b) of RCRA, 42 U.S.C. § 6973(a). Provided, however, that EPA shall not seek civil penalties pursuant to Section 106(b) or 122(l) of CERCLA, Section 7003(b) or RCRA or punitive damages pursuant to Section 107(c)(3) of CERCLA for any violation for which a stipulated penalty is provided herein, except in the case of a willful violation of this Order, or in the event that EPA assumes performance of a portion or all of the Work pursuant to Section XX, Paragraph 63. Notwithstanding any other provision of this Section, EPA may, in its unreviewable discretion, waive any portion of stipulated penalties that have accrued pursuant to this Order.

#### **XIX. COVENANT NOT TO SUE BY EPA**

60. In consideration of the actions that will be performed and the payments that will be made by Respondent under the terms of this Order, and except as otherwise specifically provided in this Order, EPA covenants not to sue or to take administrative action against Respondent pursuant to Sections 106 and 107(a) of CERCLA, 42 U.S.C. §§ 9606 and 9607(a), for

performance of the Work and for recovery of Response Costs. This covenant not to sue shall take effect on the Effective Date and is conditioned on the complete and satisfactory performance by Respondent of all obligations under this Order, including, but not limited to, payment of Response Costs pursuant to Section XV. This covenant not to sue extends only to Respondent and does not extend to any other person.

## **XX. RESERVATIONS OF RIGHTS BY EPA**

61. Except as specifically provided in this Order, nothing herein shall limit the power and authority of EPA or the United States to take, direct, or order all actions necessary to protect public health, welfare, or the environment or to prevent, abate, or minimize an actual or threatened release of hazardous substances, pollutants or contaminants, or hazardous or solid waste on, at, or from the Site. Further, nothing herein shall prevent EPA from seeking legal or equitable relief to enforce the terms of this Order, from taking other legal or equitable action as it deems appropriate and necessary, or from requiring Respondent in the future to perform additional activities pursuant to CERCLA or any other applicable law.

62. The covenant not to sue set forth in Section XIX above does not pertain to any matters other than those expressly identified therein. EPA reserves, and this Order is without prejudice to, all rights against Respondent with respect to all other matters, including, but not limited to:

- a. claims based on a failure by Respondent to meet a requirement of this Order;
- b. liability for costs not included within the definition of Response Costs;
- c. liability for performance of response action other than the Work;
- d. criminal liability;
- e. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments;
- f. liability arising from the past, present, or future disposal, release or threat of release of Waste Materials outside of the Site; and
- g. liability for costs incurred or to be incurred by the Agency for Toxic Substances and Disease Registry related to the Site.

63. Work Takeover. In the event EPA determines that Respondent has ceased implementation of any portion of the Work, is seriously or repeatedly deficient or late in its performance of the Work, or is implementing the Work in a manner that may cause an endangerment to human health or the environment, EPA may assume the performance of all or any portion of the Work as EPA determines necessary. Respondent may invoke the procedures set forth in Section XVI (Dispute Resolution) to dispute EPA's determination that takeover of

the Work is warranted under this Paragraph. Costs incurred by the United States in performing the Work pursuant to this Paragraph shall be considered Response Costs that Respondent shall pay pursuant to Section XV (Payment of Response Costs). Notwithstanding any other provision of this Order, EPA retains all authority and reserves all rights to take any and all response actions authorized by law.

#### **XXI. COVENANT NOT TO SUE BY RESPONDENT**

64. Respondent covenants not to sue and agrees not to assert any claims or causes of action against the United States, or its contractors or employees, with respect to the Work, Response Costs, or this Order, including, but not limited to:

a. any direct or indirect claim for reimbursement from the Hazardous Substance Superfund established by 26 U.S.C. § 9507, based on Sections 106(b)(2), 107, 111, 112, or 113 of CERCLA, 42 U.S.C. §§ 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law;

b. any claim arising out of response actions at or in connection with the Site, including any claim under the United States Constitution, the Hawai'i Constitution, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, as amended, or at common law; or

c. any claim against the United States pursuant to Sections 107 and 113 of CERCLA, 42 U.S.C. §§ 9607 and 9613, relating to the Site.

Except as provided in Paragraph 66 (De Micromis Waivers), these covenants not to sue shall not apply in the event the United States brings a cause of action or issues an order pursuant to the reservations set forth in Paragraphs 62(b), (c), and (e) - (g), but only to the extent that Respondent's claims arise from the same response action, response costs, or damages that the United States is seeking pursuant to the applicable reservation.

65. Nothing in this Agreement shall be deemed to constitute approval or preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. § 300.700(d).

66. Respondent agrees not to assert any claims and to waive all claims or causes of action that it may have for all matters relating to the Site, including for contribution, against any person where the person's liability to Respondent with respect to the Site is based solely on having arranged for disposal or treatment, or for transport for disposal or treatment, of hazardous substances at the Site, or having accepted for transport for disposal or treatment of hazardous substances at the Site, if

a. any materials contributed by such person to the Site constituting Municipal Solid Waste ("MSW") or Municipal Sewage Sludge ("MSS") did not exceed 0.2% of the total volume of waste at the Site; and

b. any materials contributed by such person to the Site containing hazardous substances, but not constituting MSW or MSS, did not exceed the greater of i) 0.002% of the total volume of waste at the Site, or ii) 110 gallons of liquid materials or 200 pounds of solid materials.

67. This waiver shall not apply to any claim or cause of action against any person meeting the above criteria if EPA has determined that the materials contributed to the Site by such person contributed or could contribute significantly to the costs of response at the Site. This waiver also shall not apply with respect to any defense, claim, or cause of action that a Respondent may have against any person if such person asserts a claim or cause of action relating to the Site against such Respondent.

## **XXII. OTHER CLAIMS**

68. By issuance of this Order, the United States and EPA assume no liability for injuries or damages to persons or property resulting from any acts or omissions of Respondent. The United States or EPA shall not be deemed a party to any contract entered into by Respondent or its directors, officers, employees, agents, successors, representatives, assigns, contractors, or consultants in carrying out actions pursuant to this Order.

69. Except as expressly provided in Section XXI, Paragraph 66 (De Micromis Waivers) and Section XIX (Covenant Not to Sue by EPA), nothing in this Order constitutes a satisfaction of or release from any claim or cause of action against Respondent or any person not a party to this Order, for any liability such person may have under CERCLA, other statutes, or common law, including but not limited to any claims of the United States for costs, damages and interest under Sections 106 and 107 of CERCLA, 42 U.S.C. §§ 9606 and 9607.

70. No action or decision by EPA pursuant to this Order shall give rise to any right to judicial review, except as set forth in Section 113(h) of CERCLA, 42 U.S.C. § 9613(h).

## **XXIII. CONTRIBUTION PROTECTION**

71. The Parties agree that this Order constitutes an administrative settlement for purposes of Section 113(f)(2), 42 U.S.C. §§ 9613(f)(2), and that Respondent is entitled, as of the Effective Date, to protection from contribution actions or claims as provided by Sections 113(f)(2) and 122(h)(4) of CERCLA, 42 U.S.C. §§ 9613(f)(2) and 9622(h)(4), or as may be otherwise provided by law for “matters addressed” in this Order. The “matters addressed” in this Order are the Work and Response Costs. The Parties further agree that this Order constitutes an administrative settlement for the purposes of Section 113(f)(3)(B) of CERCLA, 42 U.S.C. § 9613(f)(3)(B), pursuant to which the Respondent has, as of the Effective Date, resolved its liability to the United States for the matters addressed. Except as provided in Paragraphs 66 and 67, nothing in this Order precludes the United States or Respondent from asserting any claims, causes of action, or demands against any persons not parties to this Order for indemnification, contribution, or cost recovery. Nothing herein diminishes the right of the United States, pursuant

to Section 113(f)(2) and (3) of CERCLA, 42 U.S.C. § § 9613(f)(2)-(3), to pursue any such persons to obtain additional response costs or response action and to enter into settlements that give rise to contribution protection pursuant to Section 113(f)(2).

#### **XXIV. INDEMNIFICATION**

72. Respondent shall indemnify, save and hold harmless the United States, its officials, agents, contractors, subcontractors, employees and representatives from any and all claims or causes of action arising from, or on account of, negligent or other wrongful acts or omissions of Respondent, its officers, directors, employees, agents, contractors, or subcontractors, in carrying out actions pursuant to this Order. In addition, Respondent agrees to pay the United States all costs incurred by the United States, including but not limited to attorneys fees and other expenses of litigation and settlement, arising from or on account of claims made against the United States based on negligent or other wrongful acts or omissions of Respondent, its officers, directors, employees, agents, contractors, subcontractors and any persons acting on its behalf or under its control, in carrying out activities pursuant to this Order. The United States shall not be held out as a party to any contract entered into by or on behalf of Respondent in carrying out activities pursuant to this Order. Neither Respondent nor any such contractor shall be considered an agent of the United States.

73. The United States shall give Respondent notice of any claim for which the United States plans to seek indemnification pursuant to this Section and shall consult with Respondent prior to settling such claim.

74. Respondent waives all claims against the United States for damages or reimbursement or for set-off of any payments made or to be made to the United States, arising from or on account of any contract, agreement, or arrangement between any one or more of Respondent and any person for performance of Work on or relating to the Site, including, but not limited to, claims on account of construction delays. In addition, Respondent shall indemnify and hold harmless the United States with respect to any and all claims for damages or reimbursement arising from or on account of any contract, agreement, or arrangement between Respondent and any person for performance of Work on or relating to the Site, including, but not limited to, claims on account of construction delays.

#### **XXV. INSURANCE**

75. Within seven (7) days after the Effective Date, Respondent shall maintain for the duration of this Order and provide certificates of insurance demonstrating comprehensive general liability insurance and automobile insurance with limits of \$2,000,000 (two million dollars), combined single limit. In addition, for the duration of the Order, Respondent shall satisfy, or shall ensure that its contractors or subcontractors satisfy, all applicable laws and regulations regarding the provision of worker's compensation insurance for all persons performing the Work on behalf of Respondent in furtherance of this Order. If Respondent demonstrates by evidence satisfactory to EPA that any contractor or subcontractor maintains insurance equivalent to that described above, or insurance covering some or all of the same risks

but in an equal or lesser amount, then Respondent need provide only that portion of the insurance described above

## **XXVI. FINANCIAL ASSURANCE**

76. Within fifteen (15) days of the Effective Date or as otherwise agreed by the Parties, Respondent shall establish and maintain financial security in the amount of \$500,000 in one or more of the following forms:

- a. A surety bond guaranteeing performance of the Work;
- b. One or more irrevocable letters of credit equaling the total estimated cost of the Work;
- c. A trust fund;
- d. A guarantee to perform the Work by one or more parent corporations or subsidiaries, or by one or more unrelated corporations that have a substantial business relationship with the Respondent; or
- e. A demonstration that Respondent satisfies the requirements of 40 C.F.R. Part 264.143(f).

77. If Respondent seeks to demonstrate the ability to complete the Work through a guarantee by a third party pursuant to Paragraph 76(a) of this Section, Respondent shall demonstrate that the guarantor satisfies the requirements of 40 C.F.R. § 264.143(f). If Respondent seeks to demonstrate its ability to complete the Work by means of the financial test or the corporate guarantee pursuant to Paragraph 76(d) or (e) of this Section, it shall resubmit sworn statements conveying the information required by 40 C.F.R. § 264.143(f) annually, on the anniversary of the Effective Date. In the event that EPA determines at any time that the financial assurances provided pursuant to this Section are inadequate, Respondent shall, within thirty (30) days of receipt of notice of EPA's determination, obtain and present to EPA for approval one of the other forms of financial assurance listed in Paragraph 76 of this Section. Respondent's inability to demonstrate financial ability to complete the Work shall not excuse performance of any activities required under this Order.

78. If, after the Effective Date, Respondent can show that the estimated cost to complete the remaining Work has diminished below the amount set forth in Paragraph 76 of this Section, Respondent may, on any anniversary date of the Effective Date, or at any other time agreed to by the Parties, reduce the amount of the financial security provided under this Section to the estimated cost of the remaining Work to be performed. Respondent shall submit a proposal for such reduction to EPA, in accordance with the requirements of this Section, and may reduce the amount of the security upon approval by EPA. In the event of a dispute, Respondent may reduce the amount of the security in accordance with the written decision resolving the dispute.



79. Respondent may change the form of financial assurance provided under this Section at any time, upon notice to and approval by EPA, provided that the new form of assurance meets the requirements of this Section. In the event of a dispute, Respondent may change the form of the financial assurance only in accordance with the written decision resolving the dispute.

## **XXVII. MODIFICATIONS**

80. The OSC or RAO may make modifications to any plan or schedule in writing or by oral direction. Any oral modification will be memorialized in writing by EPA promptly, but shall have as its effective date the date of the OSC's or RAO's oral direction. Any other requirements of this Order may be modified in writing by mutual agreement of the parties.

81. If Respondent seeks permission to deviate from any approved Work Plan or schedule, Respondent's Project Coordinator shall submit a written request to EPA for approval outlining the proposed modification and its basis. Respondent may not proceed with the requested deviation until receiving oral or written approval from the OSC or RAO pursuant to Paragraph 80.

82. No informal advice, guidance, suggestion, or comment by the OSC, RAO or other EPA representatives regarding reports, plans, specifications, schedules, or any other writing submitted by Respondent shall relieve Respondent of its obligation to obtain any formal approval required by this Order, or to comply with all requirements of this Order, unless it is formally modified.

## **XXVIII. ADDITIONAL REMOVAL ACTION**

83. [This section intentionally left blank.]

## **XXIX. NOTICE OF COMPLETION OF WORK**

84. When EPA determines, after EPA's review of the Final Report, that all Work has been fully performed in accordance with this Order, with the exception of any continuing obligations required by this Order, EPA will provide written notice to Respondent. If EPA determines that any such Work has not been completed in accordance with this Order, EPA will notify Respondents, provide a list of the deficiencies, and require that Respondent modify the Work Plan if appropriate in order to correct such deficiencies. Respondent shall implement the modified and approved Work Plan and shall submit a modified Final Report in accordance with the EPA notice. Failure by Respondent to implement the approved modified Work Plan shall be a violation of this Order.

## **XXX. SEVERABILITY/INTEGRATION/APPENDICES**

85. If a court issues an order that invalidates any provision of this Order or finds that Respondent has sufficient cause not to comply with one or more provisions of this Order,

Respondent shall remain bound to comply with all provisions of this Order not invalidated or determined to be subject to a sufficient cause defense by the court's order.

86. This Order constitutes the final, complete and exclusive agreement and understanding among the Parties with respect to the settlement embodied in this Order. The parties acknowledge that there are no representations, agreements or understandings relating to the settlement other than those expressly contained in this Order.

**XXXI. EFFECTIVE DATE**

87. This Order shall be effective immediately after the Order is signed by the Regional Administrator or his/her delegate.

The undersigned representative(s) of Respondent certifies that it is fully authorized to enter into the terms and conditions of this Order and to bind the party it represent(s) to this document.

Agreed this \_\_\_\_ day of January, 2011 .

WASTE MANAGEMENT OF HAWAII, INC.

BY: \_\_\_\_\_

ROBERT E. LONGO

Vice President and Assistant Secretary

It is so ORDERED and Agreed this \_\_\_\_\_ day of January, 2011.

BY: \_\_\_\_\_

Jane Diamond, Director  
Superfund Division, Region IX  
U.S. Environmental Protection Agency

DATE: \_\_\_\_\_